No. 6892.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
SABURO HIGA,
On Habeas Corpus.

Saburo Higa,
Appellant,

vs.

A. E. Burnett, District Director, United States Immigration Service, District No. 31,
Appellee.

APPELLANT'S OPENING BRIEF.

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OPENING BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of habeas corpus and remanding Saburo Higa to the custody of the United States Immigration Service [Transcript of Record, p. 11].

The original records of the Department of Labor have been filed with the clerk of this court pursuant to an order of the District Court [Transcript of Record, p. 17].

Throughout this brief we will refer to those records as "Immigration File". The printed transcript of the proceedings in the District Court will be referred to as "Transcript of Record".

Saburo Higa is an alien, subject of Japan, who has been ordered deported from this country by the Secretary of Labor on the sole ground that he has remained longer in the United States than permitted by the Immigration Act of 1924, in that he has failed to maintain the status of a student.

The facts in the case are in the main undisputed. Saburo Higa's father had apparently lived in Hawaii for a long period of time. When Saburo Higa was fourteen years old, he left Japan and went to Hawaii to join his father. He was duly and regularly admitted to Hawaii on May 30, 1918, having in his possession a Japanese passport and visa by an American consul. He then started to go to school in Hawaii and completed high school there.

In 1927, he received a permit from the United States Immigration Service at Honolulu to proceed to the mainland to become a student at the University of Washington. He was admitted to the mainland at Victoria on September 15, 1927. He entered the University of Washington that same month and remained there for three years. At the end of the 1930 term, he decided to stay out one year to rest and to earn money to enable him to complete his course. He was in good standing at the school at that time, and testified that he intended to reenter in the fall of 1931. Before he had a chance to reenter, deportation proceedings were instituted against

him on the charge that he had failed to maintain his status as a student. At the conclusion of the hearing he was ordered deported to Japan.

After he had been ordered deported, he filed a petition for a writ of habeas corpus, alleging in substance that there was no evidence to show that he had ever abandoned his status as a student, or to sustain the warrant of deportation [Transcript of Record, pp. 3 to 5]. The writ, by order of the District Court [Transcript of Record, p. 6], was issued and served [Transcript of Record, pp. 7 and 8]. Return was duly made [Transcript of Record, pp. 8 and 9]. The evidence adduced at the hearing on the writ consisted of the records of the United States Immigration Service now on file with the clerk of this court. Thereafter, the District Court made its order discharging the writ and remanding Saburo Higa to the custody of the Immigration Service [Transcript of Record, p. 11]. From that order this appeal is presented.

SPECIFICATIONS OF ERROR RELIED UPON.

Specifications of error relied upon by appellant are as follows:

Specification 1. The court erred in holding and deciding that Saburo Higa should be deported to Japan for failing to maintain his exempt status of a student in the United States. This is Assignments of Error 1, 2, 3, 4, 5 and 6.

Specification 2. The court erred in holding and deciding that Saburo Higa was not a *bona fide* student and entitled to remain in the United States as such. This is Assignment of Error No. 7.

ARGUMENT.

At the outset, it should be noted that Saburo Higa was duly and regularly admitted to the United States at Honolulu, Territory of Hawaii, on May 30, 1918, for permanent residence. This is conceded. He was permitted, in 1920, to go to the mainland for the purpose of attending the University of Washington.

It is our first contention that there is nothing in the Immigration Act of 1924, or in any other Immigration Act, requiring an alien, who has been lawfully admitted to the United States at the Territory of Hawaii and later allowed to go to the mainland as a student, to return to Hawaii or to Japan after he has completed his studies. We challenge respondent to cite any authority giving the Immigration Service the right to effect deportation in such a case.

The only section of the Immigration Act of 1924 referring to students is section 4, subdivision (e) (8 U. S. C. 204), which reads as follows:

> "An immigrant who is a *bona fide* student at least fifteen years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn."

It should be noted that the term used in section 4 (e) is "United States" and not "Continental United States".

The only section referring to the deportation of an alien for failing to maintain his exempt status as a student is section 15 (8 U. S. C. 215), which reads as follows:

> "The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

It should be noted that this section only applies to aliens who are admitted to the "United States". That section, like section 3, does not say "Continental United States". It is apparent that Congress in the Immigration Act of 1924 did not intend to require aliens who had previously been lawfully admitted to Hawaii and later admitted to the United States as students to return to Hawaii or to their native country at the expiration of their studies.

Section 28 (a) of the Immigration Act of 1924 (8 U. S. C. 224) defines "United States" as follows:

> "(a) The term 'United States,' when used in a geographical sense, means the States, the Territories of Alaska and Hawaii, the District of Columbia, Porto Rico, and the Virgin Islands; and the term 'Continental United States' means the States and the District of Columbia."

Thus, section 4 (e) and section 15 have no application whatever to any alien traveling between Hawaii and continental United States.

There being no restriction in the law requiring an alien domiciled in Hawaii to depart from continental United States when he was allowed to go there for the purpose of studying, the deportation order is null and void. In any event, Saburo Higa, having been lawfully and legally domiciled in Hawaii for so many years, should be deported to that place rather than to Japan. *Darabi v. Northrup* (C. C. A. 6th, 1931), 54 Fed. (2d) 70.

While, strictly speaking, it is not necessary to a decision in this case, it may be well to point out that nowhere in the statutes of the United States is there any restriction on an alien admitted to Hawaii from coming to "Continental United States" and taking up his residence there. The Immigration Service seems to be laboring under the impression that the Presidential Proclamation of March 14, 1907, is still in force and effect. The Proclamation of March 14, 1907, was promulgated by President Roosevelt, and it is a matter of common knowledge that such proclamation was distasteful to the Japanese Government, which government vigorously protested. This protest resulted in the so-called "Gentlemen's Agreement". After this so-called "Gentlemen's Agreement" was entered into, the Proclamation of March 17, 1907, was entirely superseded and modified by the Proclamation of President Taft, issued February 24, 1913, which is the only executive order now in force on the subject matter of aliens admitted to various territories of the United States and

their free passage to other portions of the nation. *Akira Ono v. U. S.* (C. C. A. 9th, 1920), 267 Fed. 359.

While the Proclamation of 1907 expressly mentioned Hawaii as one of the places from which laborers with limited passports could not be admitted, it is important that in the Proclamation of 1913 no mention of Hawaii is made. Presumably the mention of Hawaii was left out for the reason that the President was fully aware that any restriction on the free movement of legally domiciled aliens from incorporated territories of the United States to and from the states would be illegal and unconstitutional. In any event, the Proclamation of February 24, 1913, by its very language only applies to aliens coming into the continental territory of the United States from the foreign country issuing him his passport, or from an insular possession of the United States, or from the Canal Zone. The language of the proclamation is as follows:

> "It is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States *from such country, or from such insular possession, or from the Canal Zone.*" (Italics ours.)

Manifestly, Saburo Higa did not enter continental United States from Japan or from an insular possession or from the Canal Zone. He entered from an integral part of the United States, to-wit, an incorporated territory.

The territory held by the United States not included within the states themselves in the main falls within three classifications:

(a) Incorporated territory, such as Hawaii and Alaska;

(b) Possessions, such as the Philippines;

(c) Territories, possessed by the United States but not, strictly speaking, owned, such as the Canal Zone.

Pursuant to a joint resolution (30 Statutes at Large 750), Hawaii was annexed to the United States on August 12, 1898. At that time, it was merely a possession of the United States although within its jurisdiction. However, under the Act of June 14, 1900 (31 Statutes at Large 141; 48 U. S. C. 491, *et seq.*), Hawaii was formally incorporated as a territory of the United States. *Hawaii v. Mankichi,* 190 U. S. 197; 47 L. Ed. 1016. At that time, the Constitution and laws of the United States were formally extended to Hawaii. (48 U. S. C. 495). All persons who were citizens of Hawaii were declared to be citizens of the United States. (48 U. S. C. 494 and 8 U. S. C. 4.) Of course, between 1898 and 1900, Hawaii had the status merely of an insular possession. During that time immigration could be restricted from Hawaii to the United States. But from and after 1900, Hawaii was as much an integral part of this nation as any of the states. It bears the same relation to the rest of the country as the District of Columbia and Alaska do, and as Arizona and New Mexico did before their admission into the Union. Hawaii, at the present time, being an incorporated territory, is qualified to become a state as and when Congress may choose to admit it. The distinction between incorporated territories and insular possessions is brought out in the cases of *De Lima v. Bidwell,*

182 U. S. 1; 45 L. Ed. 1041; and *Downes v. Bidwell*, 182 U. S. 244; 45 L. Ed. 1088.

Thus, it would be unconstitutional for either Congress or the President to restrict the free passage of aliens lawfully domiciled in Hawaii, an integral part of the United States, to another portion of the United States, for the same reason that it would be unconstitutional to restrict free passage of aliens from California to Nevada, as not being within the powers given the executive or legislative branches of this government by the Constitution.

If Saburo Higa's entry to the mainland was prohibited by the Presidential Proclamation (which it was not), then he was prohibited from coming here for any purpose, either as a student or otherwise, as we find no express provision in any of the laws for the admission of aliens domiciled in Hawaii to the mainland as students. Having been admitted to the mainland, his designation as a student is mere surplusage and should be disregarded.

The case of *Sugimoto v. Nagle* (C. C. A. 9th, 1930), 38 Fed. (2d) 207, will undoubtedly be cited by respondent in support of their contentions that immigration can be and is restricted between Hawaii and continental United States. However, a perusal of that case will indicate that the alien there involved did not on his last trip come from Hawaii, but came from Japan, although at one time he had been domiciled in Hawaii. In other words, he came squarely within the Presidential Proclamation of 1913 as he came last from his own country and not from Hawaii.

But even if we should concede for instance (which we do not) that students entering continental United States from Hawaii must return to their native land upon terminating their status as students, still in the case at bar,

an examination of the evidence in the Immigration File will establish that Saburo Higa was still a *bona fide* student at the time deportation proceedings were instituted against him. He came to Hawaii at the age of fourteen years, went to school there, and completed high school. Then he came to the United States and entered the University of Washington for a full four-year course. He had completed three years of his work, when he decided to stay out one year for a rest and to earn sufficient money to enable him to complete his course. At that time, the Registrar of the University of Washington furnished a certificate which is part of the Immigration File, certifying that he was entitled to junior standing in the University. Higa himself testified that he intended to reenter the school in October 1931. His intention in this regard was borne out by the stipulation that Virginia Titus, a high school teacher, would so testify if she were called.

The only sensible course to pursue in this regard, would have been for the Immigration Service to wait until October, 1931, only a few months, and see if he did reenter the University. We respectfully submit that if they had waited that period of time, they would have found that he did reenter and was a student. There is nothing in the Immigration Act requiring that a student continually engage in his studies. Many students of the highest calibre are required to work their way through school and to make sufficient money on the side to assist them.

U. S. ex rel Antonini v. Curran (C. C. A. 2nd, 1926), 15 Fed. (2d) 266;

Low Cho Oy v. Nagle (C. C. A. 9th, 1927), 16 Fed. (2d) 1002.

In *U. S. ex rel Antonini v. Curran, supra*, the court says, at page 267:

> "(2) Subdivision D of rule 9 of the Immigration Rules promulgated by the Department of Labor under the provisions of the Immigration Act, that a nonquota immigrant student 'who engages in any business or occupation for profit, or who labors for hire, shall be deemed to have abandoned his status as an immigrant student, and shall on the warrant of the Secretary of Labor be taken into custody and deported,' must be construed as applying to those who definitely give up their studies, and instead engage in business or work for profit or hire, but not to students, otherwise *bona fide*, who during their studies gain their maintenance and tuition by self-supporting labor."

CONCLUSION.

In conclusion, Sabulo Higa cannot be deported to Japan for the following reasons:

(1) Because he was lawfully admitted to the United States for permanent residence, not as a student, at Hawaii on May 30, 1918.

(2) Because there is no requirement in the law that a student admitted to the mainland from Hawaii must maintain his status as such.

(3) Because there is no restriction on the free passage of lawfully domiciled aliens from Hawaii to continental United States.

Respectfully submitted,

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